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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL ENERGY REGULATORY COMMISSION
AND JAMES B. EDWARDS, SECRETARY OF ENERGY,
Appellants,

v.

THE STATE OF MISSISSIPPI, ET AL.,
Appellees.

On Appeal From The United States District Court For The Southern District Of Mississippi

BRIEF OF HOFFMANN-LA ROCHE INC., MADISON PAPER INDUSTRIES, PARSONS & WHITTEMORE, INC., PHILIP MORRIS INCORPORATED AND UNION OIL COMPANY OF CALIFORNIA AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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QUESTION ADDRESSED BY AMICI CURIAE

Section 210 of the Public Utility Regulatory Policies Act requires the Federal Energy Regulatory Commission to prescribe rules that impose upon electric utilities obligations to sell electricity to and purchase electricity from firms that operate qualifying cogeneration and small power production facilities. Under Section 210(f), State regulatory authorities are directed to implement these rules for electric utilities over which they have ratemaking authority.

This brief addresses the question whether the provisions of Section 210 are a proper exercise of the constitutional powers of Congress to regulate interstate commerce in a manner that is consistent with the federal system of government embodied in the Constitution.

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Hoffmann-La Roche Inc., Madison Paper Industries, Parsons & Whittemore, Inc., Philip Morris Incorporated and Union Oil Company of California file this brief as *amici curiae* to urge that the decision of the court below be reversed insofar as it held unconstitutional certain provisions in Section 210 of the Public Utility Regulatory Policies Act. All parties have consented to the filing of this brief.*

INTEREST OF AMICI CURIAE

Amici curiae are industrial firms with operations located throughout the United States. Hoffmann-La Roche Inc. manufactures pharmaceuticals, fine chemicals, vitamins and diag-

*In addition to the State of Mississippi, the Mississippi Public Service Commission and Mississippi Power and Light Company are appellees in this case.

nostics. Madison Paper Industries, a joint venture formed by The New York Times Company and a Finnish paper concern, operates a paper mill. Parsons & Whittemore, Inc. has operations in the pulp and paper industry and, more recently, has constructed and intends to operate resource recovery facilities designed to generate electricity from municipal solid waste. Philip Morris Incorporated produces beverage and tobacco products, and Union Oil Company of California is a natural resource concern engaged in oil and gas operations, refining, and geothermal and oil shale projects.

Despite the diversity of their operations, these *amici curiae* have one thing in common. Each is constructing, if not actually operating, at least one facility capable of producing electricity. In general, they engage in industrial operations that require considerable quantities of steam. Under a process known as cogeneration, this steam can be used both to supply thermal energy needed for the company's operations and to generate electricity. In addition, some of the *amici curiae* can engage more directly in the production of electricity through operation of low-head hydroelectric facilities, through employment of geothermal technology or by conversion of potential energy in municipal solid waste into usable electric energy.

The contribution industrial firms such as *amici curiae* can make toward meeting the national requirements for electricity and thereby reducing the nation's dependence on imported fuels is widely recognized. Realization of this potential, however, has been impeded by the existence of federal and State regulation governing the production of electric energy and by the adverse attitude historically adopted by electric utilities. All industrial firms — even those with their own electric generating capacity — must rely upon electric utilities for some electric services. In addition, electric utilities are the principal, if not the only, purchasers of electricity that an industrial firm may wish to sell. Accordingly, the cooperation of the existing electric power industry is essential for the development of electric generation capability by firms whose primary interest lies in other industries.

The legislative goal in Section 210 of the Public Utility Regulatory Policies Act is to remove the barriers that have blocked production of electricity by firms that are not part of the existing electric power industry. The section thus exempts certain industrial generation of electricity from unnecessary federal and State regulation, provides firms with a reasonable opportunity to market the electricity they generate and assures them of needed stand-by and supplemental electric services.

These exemptions, marketing opportunities and assurances of needed power supply ultimately could enable industrial firms to produce a large percentage of the national demand for electricity.[1] Spurred by enactment of Section 210, *amici curiae* and other industrial firms have begun to look for ways to install the capacity to generate electricity or to increase their existing capacity. For example, Hoffmann-La Roche is constructing a 23.3-megawatt cogeneration facility in New Jersey; Parsons & Whittemore is considering the installation of a large generator in a projected expansion of its pulp mill located in southern Alabama; and Union Oil Company of California is continually exploring for geothermal resources throughout the United States and examining all of its operations that discharge waste heat in order to find ways to harness this heat for the production of electric power.

Amici curiae believe that the important national effort stimulated by the enactment of Section 210 should not be curtailed in its infancy by the novel and, we respectfully submit, erroneous theory of constitutional interpretation espoused by the court below. As we demonstrate hereinafter, Section 210 is well within the constitutional power of Congress to regulate interstate commerce and is fully consistent with the federal

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[1] Public Utility Rate Proposals of President Carter's Energy Program (Part E of S. 1469): Hearings Before the Subcomm. on Energy Conservation and Regulation of the Senate Comm. on Energy and Natural Resources, 95th Cong., 1st Sess. pt. 1 at 141-43 (1977) (Report from the Library of Congress, Congressional Research Service) [hereinafter cited as 1977 Senate Hearings].

system embodied in the Constitution. *Amici curiae* therefore support appellants in this case and urge that the decision of the court below be reversed.

STATEMENT

1. Relevant Characteristics Of The Electric Power Industry.

The electric power industry "constitutes one of the major industries in the United States."[2] Its revenues — $53 billion in 1976 — account for about three percent of the gross national product. Its assets exceed $200 billion, and it serves over 84 million purchasers of electricity.[3] Production of electric energy consumes vast amounts of the nation's increasingly precious energy resources. In 1976, for instance, the electric power industry used 16 percent of the natural gas and 10 percent of the petroleum consumed in the United States.[4]

Electricity is produced in generating plants located at various points throughout the United States and transmitted from these plants through high-voltage transmission grids to distribution systems, which deliver electricity in lower voltages to industrial, commercial and residential users. These distribution systems typically are operated as part of a single enterprise, which controls the transmission systems that connect its generating plants with its distribution systems.[5] As one writer has described the industry —

> The most common pattern is for a relatively large, vertically integrated system to serve an extensive geographic

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[2] H. Rep. 95-496, 95th Cong. 1st Sess. pt. 4 at 125 (1977); S. Rep. No. 95-442, 95th Cong., 1st Sess. 7 (1977).

[3] S. Rep. No. 95-442, 95th Cong., 1st Sess. 7 (1977).

[4] *Id.* at 23.

[5] There are virtually no firms engaged solely in transmission. Competitive Aspects of the Energy Industry: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 91st Cong. 2d Sess. 11 (1971) [hereinafter cited as 1970 Hearings].

> area, with several smaller private, cooperative and municipal systems existing as islands within the larger system's sphere of operation and frequently purchasing their power at wholesale from the larger system.[6]

Electricity is produced in the United States by electric power companies which, almost exclusively, rely upon well-known methods of generating electric energy in large central power plants using coal, oil, gas, nuclear fuels or hydro-power. A small, but highly significant portion, however, is generated by industrial firms by means of the cogeneration process. Under this process, thermal heat from steam produced primarily for industrial purposes is used to generate electricity or, conversely, waste heat created in the generation of electricity is used to produce steam. Since the thermal energy so used otherwise would be wasted, cogeneration is an extremely efficient means for concurrent production of two forms of useful energy — electricity and heat. As late as 1950, it was employed to produce as much as 15 percent of the nation's electricity. By 1977, however, this percentage had dropped considerably, and cogeneration accounted for approximately 4 percent of the nation's total.[7]

In recent years, other possible sources of electric power have received considerable attention. It has been pointed out that a significant portion of the nation's electricity might be produced from geothermal resources, solar energy, wind power, low-lead hydro-electric power and, in general, energy sources other than fossil fuels. A number of projects based upon these energy sources have been started — usually on a small scale — and many more are in the planning stage.

There is little significant competition within the electric power industry. High fixed costs of electric transmission and

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[6] Meeks, Concentration in the Electric Power Industry: The Impact of Antitrust Policy, 72 Col.L.Rev. 64, 68-69 (1972).

[7] Hearings on the National Energy Act (H.R. 6831) Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 1st Sess. pt. 3 at 93 (1977) [hereinafter cited as 1977 House Hearings].

distribution equipment and low incremental costs of distributing additional units over an existing system give the industry pronounced economies of scale, at least at the transmission and distribution levels. In addition, geographic markets for electricity — at least in the past — have been local and, hence, relatively small. As a result of these two factors, it generally has been believed that the costs of supplying electricity to a given market are minimized if the entire market is supplied by a single firm.[8]

The local monopolies of the electric power industry, moreover, are protected by governmental regulation. Beginning in the first quarter of this century, State and municipal regulatory commissions have been established to regulate the business of electric utilities.[9] The court below specifically dealt with the regulatory system for Mississippi, which was established in 1956 by the Mississippi Public Utilities Act and which is characteristic of the systems adopted in many States for the regulation of electric companies.[10]

Under the Mississippi Act, public utilities are defined to include all "persons and corporations . . . now or hereafter owning or operating in [Mississippi] equipment or facilities for . . .

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[8] *See, e.g.*, I Kahn, The Economics of Regulation: Principles and Institutions 10 (1970); Bonbright, Principles of Public Utility Rates 10-17 (1961).

[9] According to the Federal Power Commission's 1970 National Power Survey, only four States had not established State regulatory commissions, but even in these four states, various forms of local regulation were authorized. *See*, Federal Power Commission, 1970 National Power Survey I-2-9 (1970). By 1979, regulatory commissions had been established in 49 states and the District of Columbia. Nebraska is the only State which does not regulate its utilities. *See* 2 Dep't of Energy, Public Utility Regulatory Policies Act of 1978, Annual Report to Congress 107-42 (1980). For a general description of the origin of state regulation of electric utilities, see MacDonald, *Insull* 113-28 (1962).

[10] Act of Mar. 29, 1956, ch. 372 [1956] Miss. Laws 531 (1956) *codified in* Miss. Code Ann. §§ 77-3-1 to 77-3-89 (1972).

generation, manufacture, transmission or distribution of electricity to or for the public for compensation."[11] The Mississippi Public Service Commission is vested with "exclusive original jurisdiction over the intrastate business and property of public utilities"[12] and has the authority to issue certificates of public convenience and necessity, which are required for entry into virtually any phase of the business of supplying electricity.[13]

The heart of Mississippi's scheme of electric utility regulation is set forth in Section 8 of the Mississippi Public Utilities Act, which requires (1) that "[n]o rate made, deposit or service charge demanded or received by any public utility shall exceed that which is just and reasonable" and (2) that each utility "shall furnish adequate, efficient and reasonable service."[14] The Mississippi Public Service Commission enforces these requirements by supervising the adequacy of the service afforded by the utility and regulating the rates charged for the service.[15] In the course of this regulatory supervision, hardly any expenditure the utility makes is exempt from review and question by the Commission.[16]

Retail sales of electricity in the United States thus, with few exceptions, are subject to the close supervision of State or local regulatory authorities. These sales generally are made by large enterprises, and the electricity sold has traveled over transmission grids that are owned and controlled by generating companies. Consequently, access both to retail and whole-

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[11] Miss. Code Ann. § 77-3-3 (1972).

[12] *Id.* at § 77-3-5.

[13] *Id.* at § 77-3-11.

[14] *Codified in id.* at § 77-3-33.

[15] *Id.* at §§ 77-3-21, 77-3-33.

[16] *See, e.g.*, Southern Bell Telephone & Telegraph Co. v. Mississippi Public Service Commission, 237 Miss. 157, 113 S. 2d 622 (1959); Mississippi Public Service Commission v. Home Telephone Co., 236 Miss. 444, 110 So. 2d 618 (1959).

sale markets for electricity in the United States is controlled by generating companies, which are protected in monopoly positions, not only by State requirements that a certificate is needed for entry into their industry, but, perhaps more important, by the control they have over the means of transmitting electricity to the distribution systems that deliver electricity for sale to the ultimate retail purchasers.

2. Background For Section 210 of the Public Utility Regulatory Policies Act.

While it generally is acknowledged that distribution and transmission of electric energy are by nature monopolistic, perceptive students of the electric power industry for several years have pointed out that "the necessity of monopoly at one level of the industry does not require the vertical extension of monopoly to other levels."[17] Questions thus have arisen whether the existing pattern of vertical integration in the electric power industry is justified, either on technological or economic grounds.[18]

During the 1970's, as the cost of building new generators rose and the prices of fuels used to produce electricity skyrocketed, public attention increasingly turned to methods of conserving electric energy and making its production more efficient. Proposals were made to reform the retail rates charged by electric utilities so as to discourage unnecessary use of electricity, particularly during peak periods.[19] Other proposals called for application of antitrust principles to foster competition in the electric power industry.[20]

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[17] Meeks, *supra* note 6 at 76.

[18] *See, e.g.*, Meeks, *supra* at note 6; Breyer & MacAvoy, Planning the Production of Electricity, in Energy Regulation by the Federal Power Commission (1974); Weiss, Antitrust and the Electric Power Industry, in Promoting Competition in Regulated Markets (1975); 1970 Hearings, *supra* note 5, at 138.

[19] *See* Berlin, Cicchetti & Gillen, Perspective on Power 29-50 (1974).

[20] Meeks, *supra* note 6; Weiss, *supra* note 18.

In the Spring of 1976, hearings were held by the House Subcommittee on Energy and Power to consider a number of these proposals.[21] One of the measures considered called for study "of means to foster increased competition in the electric utility industry," along with a study of cogeneration systems, which were described as "individual systems for generating electricity at or near the site of consumption, not for sale to the general public, and which include means for utilizing waste heat produced in the process of such generation."[22]

Testimony given during the hearings generally favored the proposed studies.[23] With respect to possibilities for generating electricity from industrial waste heat, proposals to explore these possibilities received strong support. For example, a Federal Energy Administration official testified as follows:

> The onsite generation of electricity as well as the co-use of waste steam out of electric generating plants are really the same issue and *it seems to us that the whole bundle of savings is probably one of the largest generic groups of savings that we can get.*[24]

Spokesmen from the electric power industry also supported the study of future development of cogeneration. One executive from the industry testified that "the potential for energy conservation, through the use of energy sources that have heretofore been ignored or labeled 'waste,' probably exists in many industrial operations,"[25] and went on to explain the economics of this potential from the utility standpoint as follows:

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[21] Electric Utility Rate Reform and Regulatory Improvement: Hearings Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 2d Sess. (1976) [hereinafter cited as 1976 House Hearings].

[22] H.R. 12461, 94th Cong., 2d Sess. § 310 (1976) *reprinted in* 1976 House Hearings *supra* note 21, at 3, 49-52.

[23] *See, e.g.*, 1976 House Hearings, *supra* note 21, at 296-97, 972, 1193, 1602.

[24] *Id.* at 308 (emphasis added).

[25] *Id.* at 1594.

> If the industry has a lot of heat and he can make more electricity than he needs himself, then the utility should explore the economics of purchasing that electricity for its own system use at the incremental cost of generation at any point in time when it is available.[26]

3. Legislative Consideration Leading To Section 210.

Approximately one year after the 1976 subcommittee hearings, the President proposed that the Congress enact extensive energy legislation. A major portion of this proposed legislation dealt with public utility regulatory policies and urged adoption of a number of the measures to encourage conservation and increase efficiency that had been discussed in previous years.[27]

(a) House Consideration

As introduced both in the House and in the Senate, the President's proposed legislation contained provisions expressly designed "to increase the efficiency of energy resource use in the generation and transmission of electric power, and the reliability of electric service, through greater use of . . . cogeneration."[28] The provisions on cogeneration would have directed the Administrator of the Federal Energy Administration to "prescribe rules requiring electric utilities to offer to sell electric energy to any qualifying cogenerator and to offer to purchase electric energy from such cogenerators."[29]

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[26] *Id.* at 1614.

[27] H.R. Doc. No. 95-138, 95th Cong., 1st Sess. pt. E (1977).

[28] H.R. 6831, 95th Cong., 1st Sess. § 501(b)(3)(1977) (as introduced); S. 1469, 95th Cong., 1st Sess. § 501(b)(3)(1977) (as introduced) *reprinted in* 1977 Senate Hearings, *supra* note 1, pt. 1 at 95, 113.

[29] H.R. 6831, 95th Cong., 1st Sess. § 522(a)(1977) (as introduced); S. 1469, 95th Cong., 1st Sess. § 522(a)(1977) (as introduced) *reprinted in* 1977 Senate Hearings, *supra* note 1, pt. 1 at 95, 96.

The House Subcommittee on Energy and Power held hearings on the bill within weeks of its introduction. The chairman opened these hearings by alluding to the hearings held by the same subcommittee in the previous year which, he stated, "have prepared us well to move forward . . . on this most important task."[30] Supporters of the cogeneration provisions in the President's energy proposal generally pointed out the need to remove the existing "barriers to cogeneration of electricity and industrial steam."[31] Witnesses testifying on behalf of the electric power industry acknowledged that the cogeneration provisions "could result in more efficient use of fuel resources."[32] And recent studies were cited to support the proposition that a substantial portion of the nation's future need for electricity could be met more efficiently by cogeneration than by new central power plants.[33]

During the hearings, the historic decline of cogeneration and its failure to develop as a substantial factor in the production of the nation's electrical needs was attributed largely to

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[30] 1977 House Hearings, *supra* note 7, pt. 3 at 2.

[31] *Id.* at 90; *See id.* at 74, 333, 342-43, 346, 354-55, 552.

[32] *Id.* at 175 (Testimony on behalf of the Edison Electric Institute). *See also id.* at 325 (Houston Lighting and Power); *id.* at 674 (Testimony on behalf of Virginia Electric and Power Co.) ("Cogeneration is a step in the right direction and some legislation is required.").

[33] *Id.* at 346, 356. In addition, it was pointed out that cogeneration offered a far more flexible means of meeting future demand:

> There is a very significant advantage in focusing on cogeneration technology in the face of the uncertainty as to what future demand is going to be, because cogeneration units can be brought on line in a much shorter time than the 7 to 10 years required for central station generating capacity. Thus, a disincentive against overcapacity built into the rate structure would be a strong incentive for cogeneration, because with a strong emphasis on cogeneration you would not have to predict 10 years in the future demand some with a high degree of accuracy.

Id., at 361-362; *see id.* at 366.

the practices of the utilities themselves. For years proponents of municipal electric distribution systems had complained that electric companies had been using their monopoly power over the nation's electric generation and transmission systems to stifle competition in the retail markets served by these companies.[34] In the 1977 House Subcommittee hearings, proponents of cogeneration — a process by which industrial firms could compete with electric power companies in the production of electricity — complained of analogous abuses of the monopolistic positions held by the power companies. In the graphic words of one witness:

> The surprising news about cogeneration is not that it can save energy and money and provide environmental benefits, but that cogeneration of electricity has been increasingly displaced in recent years by less energy efficient and less economically efficient central powerplants. The declining use of cogeneration by industry in this country can be traced directly to the antagonism of the electric utility companies. They have virtually strangled cogeneration by offering artificially low discount rates to large industrial users of electricity, by charging discriminatory backup rates to customers who cogenerate, and by either refusing to buy excess electricity from cogenerators or offering an unfairly low rate.[35]

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[34] One such complaint had led to a suit by the federal government in *Otter Tail Power Company* v. *United States*, 410 U.S. 366 (1973), a case in which the Court held that Otter Tail had violated Section 2 of the Sherman Act by attempting to ward off competition through a policy of refusing either to sell or to transmit electricity to towns that established municipal distribution systems in areas that were being served by Otter Tail.

[35] 1977 House Hearings, *supra* note 7, pt. 3 at 356-57. See also the analysis of another witness:

> I would like to make a comment regarding the importance of utility involvement with a unit at an industrial site. Achieving the maximum fuel savings or capturing the maximum economic benefit at an industrial site often involves producing much more electricity than can be consumed on-site. Therefore, sales to the utility or the direct involvement of the utility becomes crucial to capturing the optimum potential.

Id. at 504; *see also id.* at 552.

Another witness summed it up with the following observation:

> As far as the cogeneration goes, if you don't put into the statute the proposed sections on cogeneration you won't get much cogeneration. This statute opens it up to competition. The reason you don't have much cogeneration is a lot of these utility companies don't want to see any competition on their system.[36]

The House Committee on Interstate and Foreign Commerce reported out a bill that would have directed the Federal Power Commission to prescribe rules, enforceable as rules promulgated under the Federal Power Act, requiring electric utilities to offer to sell electric energy to the owner or operator of a qualifying cogeneration facility and to offer to purchase electric energy from such owner or operator.[37] The rules were to "insure that rates for such sales and purchases are just, reasonable, in the public interest, and do not discriminate against cogeneration," and the commission would have had authority to delegate its responsibilities to State agencies under certain circumstances.[38] As passed by the House, the bill contained cogeneration provisions identical to those reported out of the committee.[39]

(b) Senate Consideration

During Senate consideration of these provisions, two matters arose that significantly affected the provisions of Section 210 as they ultimately were enacted. First, the provisions were broadened to cover not only industrial cogeneration, but also small-scale production of electric energy from biomass, waste or renewable energy resources, such as wind power and solar

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[36] *Id.* at 539.

[37] H.R. 6831, 95th Cong., 1st Sess. § 546 (1977) (as reported by the House Committee on Interstate and Foreign Commerce).

[38] *Ibid.*

[39] H.R. 8444, 95th Cong., 1st Sess. (1977) (as passed by House).

energy. An amendment to accomplish this result was offered during the Senate committee hearings by Senator Percy, with the following explanation:

> [A] new range of intermediate technologies holds promise of soon being cost-competitive. For example, the Federal Power Commission states that small hydroelectric facilities at 48,000 existing factories and abandoned dams could add several percent to our electric supplies. Demonstration projects for this technology are underway in New Jersey and Idaho, and feasibility studies are being conducted in several other states, including Vermont and New York. Several dozen wind generators are in operation. Photovoltaic solar cells may soon be economical in some applications.
>
> All of these systems are small compared to today's electric power plants. All would reverse the trend toward central generating stations. They would produce electricity at dispersed sites, primarily for on-site use.
>
> Mr. Chairman, the attitude of electric companies is crucial to the success of small producers because almost all of these small-scale technologies can work economically only if they operate in conjunction with a central electric system. . . .
>
> * * * *
>
> The legislation before this Committee, S. 1469, would provide certain protections for one type of small technology: cogeneration of industrial process steam and electricity. The Administration's bill would require electric companies to connect with generators. Utilities would have to provide backup power, purchase surplus power, and transmit electricity for cogenerators. The Secretary of Energy could also prescribe regulations which give exemptions for cogenerators from Federal utility laws and from regulation as public utilities by states. My amendment expands these protections to include not only cogenerators but also all other small power producers — hydroelectric dams, solar, wind, municipal trash-to-electricity systems and others. It would make certain that reluctance on the part of electric companies to interconnect will not prevent the growth of these technologies.[40]

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[40] 1977 Senate Hearings, *supra* note 1, pt. 2 at 385-86.

A second issue arose during the Senate hearings concerning the means for effectuating the cogeneration provisions in the energy legislation proposed by the President. There was some support for an approach that would encourage cogeneration through tax incentives and financial assistance instead of through direct removal of the barriers impeding its development.[41] In addition, there was considerable discussion during the Senate hearings of the degree to which the federal government should preempt State regulatory policies. With few exceptions, however, this discussion centered on provisions other than the cogeneration provisions. These other provisions would have imposed upon State regulatory authorities certain criteria for setting the retail rates charged by large utilities.[42] A number of witnesses urged that retail rate criteria should not be forced upon the states by federal action, and some also objected to federal implementation of the cogeneration provisions.[43] Objections to federal enforcement of the cogeneration provisions, however, were not widely shared, and, in fact, some who opposed federal enforcement of the retail rate provisions, either endorsed or had no objection to federal enforcement of the cogeneration provisions.[44]

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[41] *See* S. 1363, 95th Cong., 1st Sess. (1977) (introduced by Sen. Hart) *reprinted in* 1977 Senate Hearings, *supra* note 1, pt. 1 at 68-87.

There was little disagreement, however, that barriers existed. *See, e.g.*, the following testimony of Senator Hart:

> The most immediate and inhibiting barriers to cogeneration are institutional. State and local regulatory authorities discourage cogeneration and waste heat recovery. *Many private utilities, fearing change, unreasonably refuse to purchase cogenerated power at fair rates.*

1977 Senate Hearings, *supra* note 1, pt. 1 at 127 (emphasis added).

[42] *See generally*, S. 1469, 95th Cong., 1st Sess. (1977) (as introduced) *reprinted in* 1977 Senate Hearings, *supra* note 1, pt. 1 at 95.

[43] *See, e.g.* 1977 Senate Hearings, *supra* note 1, pt. 1 at 126-127, 253-255, 268, 371, 409, 453, 755.

[44] *See, e.g.* 1977 Senate Hearings *supra* Note 1, pt. 1 at 286, 778-800 and 792-794. The Chairman of the Arkansas Public Service Commission, for example, opposed federal imposition of retail rate

At the conclusion of the hearings, the Senate Committee on Energy and Natural Resources rejected the mandatory federal provisions advocated by the President and substituted instead provisions that would have authorized the Secretary of Energy to intervene in State retail rate proceedings and advocate certain rate policies.[45] Even though the committee's reasons for preserving intact State authority over retail electric rates had no application to the cogeneration provisions in the bill,[46] the approach adopted with respect to the rate provisions nevertheless was carried over to the cogeneration provisions. The Senate committee bill thus would have authorized the Secretary of Energy to "recommend" to State authorities "guidelines requiring . . . electric utilities to offer to sell electric energy to any qualifying cogenerator or small power producer and to offer to purchase electric energy from such cogenerators or small power producers."[47] As passed in the Senate, this provision was not materially changed.[48]

4. Section 210 Of The Public Utility Regulatory Policies Act.

Differences in the cogeneration provisions in the House and Senate bills were resolved by conference. The conference report describes Section 210 as "a compromise of the House and Senate positions on cogeneration and small power production" and explains the approach adopted as follows:

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reforms, but expressly endorsed the proposed cogeneration provisions as the best "strategy for achieving energy conservation with cogeneration." *id.* pt. 1 at 815, 802-15.

[45] S. 2114, 95th Cong., 1st Sess. §§ 6-7 (1977) (as reported by the Committee on Energy and Natural Resources) *reprinted in* S. Rep. No. 95-442, 95th Cong., 1st Sess. 1, 2-3 (1977).

[46] *See* S. Rep. No. 95-442, 95th Cong., 1st Sess. 9 (1977).

[47] S. 2114, 95th Cong., 1st Sess. § 12 (1977) (as reported by the Committee on Energy and Natural Resources) *reprinted in* S. Rep. No. 95-442, 95th Cong., 1st Sess. 1, 4-5 (1977).

[48] H.R. 4018, 95th Cong., 1st Sess. § 113 (1977) (as passed by the Senate).

> In lieu of the Senate guideline approach, this section requires that States and utilities follow rules which the Federal Energy Regulatory Commission is to prescribe within one year after the date of enactment of this legislation.[49]

As finally enacted, Section 210 of the Act directs the Federal Energy Regulatory Commission to "prescribe . . . such rules as it determines necessary to encourage cogeneration and small power production." These rules must require that electric utilities offer both to sell and to purchase electric energy in dealing with cogeneration facilities and small power production facilities that meet certain qualifying conditions[50] Section 210(b) requires that the Commission's rules insure that rates of purchase "(1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest and (2) shall not discriminate against qualifying cogenerators or qualifying small power producers." Section 210(c) requires that the Commission insure that the rates for sale of electric energy to cogenerators and small power producers meet the same standards as prescribed in Section 210(b). In addition, Section 210(b) provides an upper limit on the rates that the Commission may require an electric utility to pay for electric energy. No Commission rule may provide for a purchase rate "which exceeds the incremental cost to the electric utility of alternative electric energy."[51]

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[49] H.R. Rep. No. 95-1750, 95th Cong., 2nd Sess. 97 (1978).

[50] Public Utility Regulatory Policies Act, Pub. L. No. 95-617, § 210, 92 Stat. 3117 (1978).

[51] *Id.* at § 210(b). Section 210 also directs the Commission to address another perceived impediment to cogeneration and small power production — the regulatory burdens imposed by federal and state laws. In Section 210 (e), the Commission is directed to —

> prescribe rules under which qualifying cogeneration facilities and qualifying small power production facilities are exempted in whole or part from the Federal Power Act, from the Public Utility Holding Company Act, from State laws and regulations respecting rates, or respecting the financial or organizational regulation, of electric utilities, or from any combination of the foregoing, if the Commission determines that such exemption is necessary to encourage cogeneration and small power production.

The compromise provision described in the conference report directs that, within one year after any rule is prescribed by the Federal Energy Regulatory Commission, "each State regulatory authority shall . . . implement such rule . . . for each electric utility for which it has ratemaking authority."[52] Primary enforcement responsibilities under Section 210 nevertheless rest with the Federal Energy Regulatory Commission. Section 210(h) provides that, "with respect to any operations of an electric utility, a qualifying cogeneration facility or a qualifying small power production facility which are subject to the jurisdiction of the Commission under Part II of the Federal Power Act," any rule the Commission prescribes under Section 210(a) is to be treated as a rule under the Federal Power Act.[53] Similarily, the Commission is authorized to enforce the requirements in Section 210(f) that each State regulatory authority and each nonregulated electric utility shall implement its rules. The Commission thus is authorized to bring enforcement actions directly against utilities or qualifying facilities whenever operations that are otherwise subject to Commission jurisdiction fail to comply with its rules, and the Commission may proceed against State regulatory authorities and nonregulated utilities whenever these authorities or utilities fail to implement these rules.[54]

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[52] *Id.* at § 210(f).

[53] Under the Federal Power Act, 16 U.S.C. §§ 7912-825r (1976 & Supp. II 1978), the Commission's actions for injunctive relief may be brought against any person to seek compliance with the Commission's rules. 16 U.S.C. § 825m (1976). Licensees and public utilities may be subject to forfeiture, 16 U.S.C. § 825n (1976), and willful violations may be prosecuted criminally, 16 U.S.C. § 825o (1976).

[54] Public Utility Regulatory Policies Act, Pub. L. No. 95-617, § 210(h)(2)(b), 92 Stat. 3117 (1978). The remedies available to a district court in an enforcement action under Section 210 are not spelled out in the statute, and the constitutionality of any remedy a court might choose in a subsequent enforcement action is not at issue in the instant declaratory judgment action.

SUMMARY OF ARGUMENT

As the foregoing statement demonstrates, Section 210 of the Public Utility Regulatory Policies Act is a congressional effort to encourage alternative — and more efficient — means for generating the nation's electrical needs. This objective and the economic activity which Congress chose to regulate in order to accomplish it — purchases and sales of electricity by electric utilities — unquestionably are within the province of the federal government by virtue of the Commerce Clause. In addition, the means chosen by Congress to regulate purchases and sales of electric utilities are reasonably adapted to that end. Section 210 thus plainly is within the constitutional power of Congress to regulate interstate commerce.

Moreover, the regulatory framework chosen by Congress in Section 210, which involves State implementation of federally prescribed rules, is fully consistent with the federal system of government embodied in the Constitution. The idea that agencies of State governments can be obliged to exercise their governmental powers in accordance with federal law is not repugnant to any constitutional principles of federalism. In fact, the framers of the Constitution explicitly provided in the Supremacy Clause that State judicial officers must enforce federal law. The fact that Section 210 requires State administrative officers, whose functions are described by the State itself as "quasi-judicial," to implement federal rules therefore does not render the section inconsistent with any doctrine of federalism that can be found in the Constitution.

Finally, the provisions of Section 210 do not abrogate functions that are essential to the separate and independent existence of the States contemplated in the Constitution. On the contrary, these provisions, without imposing significant burdens upon the States, were carefully designed by Congress, after consideration of several alternative measures, to resolve the practical problems posed by the need to implement national policies within an industry that is extensively regulated by State governmental agencies.

ARGUMENT

I.

Section 210 of the Public Utility Regulatory Policies Act Governs Activities That Plainly Are Within the Reach of the Constitutional Powers Granted to Congress

In Section 210 of the Public Utility Regulatory Policies Act, Congress seeks to promote more efficient use of the nation's energy resources and thereby decrease the Nation's dependence upon costly imported fuels. The legislative record demonstrates that by removing existing barriers to cogeneration and small power production vast savings would be achieved both in consumption of fuel and in the immense capital costs necessary to construct new electric generators.[55]

The transactions to which Section 210 is primarily directed — purchases and sales of electric energy by electric utilities — are well within the scope of the Commerce Clause. Nearly forty years ago the Court, in *Connecticut Light & Power Co.* v. *FPC*,[56] recognized the interstate nature of the nation's electric power industry. As the opinion in that case declared, "technologically generation, transmission, distribution and consumption [of electricity] are so fused and interdependent that *the whole enterprise is within the reach of the commerce power of Congress.*"[57]

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[55] Estimates of energy savings project that cogeneration could produce up to 21% of the nation's electricity or 7% of the nation's energy needs. 1977 Senate Hearings, *supra* note 1, pt. 1 at 141-43. The Federal Energy Administration projected that by 1985 the cogeneration resulting from this legislation would save the energy equivalent of 200,000 barrels of oil per day. 1977 House Hearings, *supra* note 8 pt. 3 at 1691. The National Science Foundation projected that all cogenerating facilities could save the energy equivalent of 680,000 barrels of oil per day by 1985. 1977 Senate Hearings, *supra* note 1, pt. 2 at 219.

[56] 324 U.S. 515 (1945).

[57] *Id.* at 529-30 (emphasis added).

With respect to its powers under the Commerce Clause, Congress "in the exercise of its discretion as to the means of carrying [these powers] into execution may adopt any means appearing to it most eligible and appropriate, which are adapted to the end to be accomplished and consistent with the letter and spirit of the Constitution" *James Everard's Breweries* v. *Day*, 265 U.S. 545, 558-59 (1924); and see *Burroughs* v. *United States*, 290 U.S. 534, 547-48 (1934) *Legal Tender Cases*, 79 U.S. (12 Wall) 457, 541-42 (1870); *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819). In the legislative process leading to Section 210, Congress considered several means to effectuate its policies respecting cogeneration and small-scale production of electricity. Among the means considered were direct federal regulation and implementation, tax and other financial incentives and federal advocacy before State regulatory bodies.[58] In the end, Congress chose to adopt a regulatory framework under which federal regulations would be implemented by those State agencies that already have responsibility for close supervision of retail operations of electric utilities. This framework certainly is "reasonably adapted to the end" (compare *Hodel* v. *Virginia Surface Mining and Reclamation Association, Inc.*, 49 U.S.L.W. 4654, at 4657 (1981)), and unquestionably is within the discretion Congress possesses to choose means appropriate to the exercise of its enumerated powers.

II.

The Requirement in Section 210 of the Act That State Regulatory Authorities Implement Rules Adopted by the Federal Energy Regulatory Commission In No Way Impairs the Ability of States to Function in the Federal System of Government Embodied in the Constitution.

In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the Court struck down amendments to the federal Fair Labor Standards Act which prescribed mandatory wage and hour

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[58] *See supra* pp. 15-18.

standards for employees of State and municipal governments. The question presented in that case was as follows:

> One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime. The question we must resolve here, then, is whether these determinations are "'functions essential to separate and independent existence,'" so that Congress may not abrogate the States' otherwise plenary authority to make them.[59]

In resolving this question, the Court looked to the substantial costs the federal wage and hour standards would have imposed upon the States and their political subdivisions[60] and the "degree to which the FLSA amendments would interfere with the traditional aspects of state sovereignty."[61]

After analyzing these factors and specifically pointing to the effect that the FLSA amendments would have on the ability of State and local governments to deliver such basic government services as police and fire protection, the Court concluded that "both the minimum wage and the maximum hour provisions will impermissibly interfere with the integral governmental functions of these bodies."[62] Quoting from the opinion in *Fry* v. *United States,* 421 U.S. 542, 547 n.7 (1975), the Court identified the constitutional infirmity in the FLSA amendments struck down in *National League of Cities* as follows:

> [E]ven if appellants may have overestimated the effect which the Act will have upon their current levels and patterns of governmental activity, the dispositive factor is

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[59] *National League of Cities* v. *Usery,* 426 U.S. 833, 845-46 (1976) (citations omitted.)

[60] *Id.* at 846-47.

[61] *Id.* at 849.

[62] *Id.* at 851.

> that Congress has attempted to exercise its Commerce Clause authority to prescribe minimum wages and maximum hours to be paid by the States in their capacities as sovereign governments. *In so doing, Congress has sought to wield its power in a fashion that would impair the States' "ability to function effectively in a federal system."* This exercise of congressional authority does not comport with the federal system of government embodied in the Constitution.[63]

The *National League of Cities* decision does not rest upon a doctrinaire precept barring all Congressional interference with the governmental operations of the States. On the contrary, the Court's opinion "adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential."[64]

The court below invoked the *National League of Cities* decision in its holding that Section 210 of the Act is "unconstitutional and void in that [it, along with Titles I and III of the Act] constitute[s] a direct intrusion on integral and traditional functions of the State."[65] The court's opinion, however, makes no attempt to draw any analogy between Section 210 and the FLSA amendments held unconstitutional in *National League of Cities*, and there is no evidence that the court below employed any "balancing approach" as contemplated by the holding in that case.[66]

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[63] *Id.* at 851-52 (emphasis added) (citations omitted).

[64] *Id.* at 856 (Blackmun, J. concurring). *See also, Hodel* v. *Virginia Surface Mining and Reclamation Association, supra* at 4660 n.29.

[65] *FERC* v. *Mississippi*, No. 279-0212(c) Final Judgment at 1-2. (S.D. Miss. Feb. 19, 1981).

[66] The decision below appears to rest largely upon the court's unsupportable assertion that "literally nothing in the Commerce clause of the Constitution . . . authorizes or justifies the federal government in taking over the regulation and control of public utilities." Judgment at 3; *see also, id.* at 6.

In fact, the provisions of Section 210 of the Public Utility Regulatory Policies Act, are not analogous, in any material respect, to the statutory provisions before the Court in *National League of Cities*. The FLSA amendments in that case, were intended by Congress to impose a general and pervasive regulatory scheme directly upon the integral operations of State governments. These amendments thus threatened substantially to impair the States' ability to function as autonomous units of government in traditional and completely local areas of State responsibility and to put State governmental agencies on a par with commercial establishments insofar as their wages and hours were concerned. By contrast, Section 210 is a federal regulation of the actions of electric power companies and the manner in which these companies deal with cogenerators and small power producers of electric power. These economic activities are, by no means, integral to the operation of State governments, and the form chosen for this regulation — State implementation of federal rules — is fully consistent with federal principles embodied in the Constitution.

The rules which the Federal Energy Regulatory Commission is directed to prescribe under Section 210 impose obligations directly upon electric utilities.[67] The functions of State governments are affected only in minor respects. First, if a State or municipal government operates an electric utility which is not subject to the ratemaking authority of a State regulatory commission the governmental utility must comply with the rules prescribed by the Commission. Secondly, the

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The United States is simply not delegated or vested by the Constitution with the power or authority to displace and to usurp the regulatory power and authority of the State of Mississippi over these utilities in the exercise of their instrastate functions and duties with respect to their intrastate customers in Mississippi.

[67] Section 210(a) expressly requires the rules to "require electric utilities to offer to" purchase and sell electricity. *Id.* at § 210(e). Public Utility Regulatory Policies Act, Pub. L. No. 95-617, § 210(a), 92 Stat. 3117 (1978).

Commission's rules may exempt qualifying facilities from "State laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities." Finally, if a State has established a regulatory commission with ratemaking authority over electric utilities, Section 210(f) requires that agency to implement the Commission's rules for each utility whose rates it has power to regulate.

The constitutionality of Section 210 is beyond question insofar as it provides that the Federal Energy Regulatory Commission rules apply to operations of government-owned utilities that are not regulated by a State authority. The Court has consistently held, both before and after *National League of Cities*, that Congress has full authority to regulate agencies of State governments that are engaged in commercial activities. *Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *United States* v. *California*, 297 U.S. 175, 183-86 (1936); *Ohio* v. *Helvering*, 292 U.S. 360 (1934); and see *National League of Cities, supra* at 854, n.18.

Moreover, there can be no doubt that the federal government has full authority under the Constitution to grant exemptions from State laws and regulations. As recently as last June, the Court reaffirmed this principle in the following passage from its opinion in *Hodel* v. *Virginia Surface Mining and Reclamation Association, supra* at 4660:

> A wealth of precedent attests to congressional authority to displace or pre-empt state laws regulating private activity affecting interstate commerce when these laws conflict with federal law [citation's omitted]. Moreover, it is clear that the Commerce Clause empowers Congress to prohibit all — and not just inconsistent — state regulation of such activities. Although such congressional enactments obviously curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important, the Supremacy Clause permits no other result.

Finally, neither the holding in *National League of Cities* nor the reasoning underlying that holding suggest any constitu-

tional infirmity in that portion of Section 210 which requires State regulatory authorities to implement Federal Energy Regulatory Commission rules for the utilities they regulate. The congressional decision to entrust State regulatory authorities with responsibilities to implement the Commission's rules certainly poses no threat to "the States' integrity or their ability to function effectively in a federal system." *Fry* v. *United States, supra* at 547 n.7. The Constitution itself, in the Supremacy Clause, expressly embodies the principle of State enforcement of federal law and explicitly requires State judicial officers to enforce federal laws. *Testa* v. *Katt*, 330 U.S. 386 (1947). As the Court observed in the *Testa* case "[t]he first Congress that convened after the Constitution was adopted conferred jurisdiction upon the state courts to enforce important federal civil laws," and, as the *Testa* decision holds, State courts cannot refuse to accept this jurisdiction.[68] Section 210 thus cannot be deemed inconsistent with the federal system of government embodied in the Constitution solely because it requires that a State commission, which the State of Mississippi itself describes as having a "quasi-judicial" role,[69] exercise its governmental powers to implement federal law.

The principles underlying the holding in *National League of Cities* plainly support the constitutionality of Section 210. Even though regulation of the retail operations of electric utilities originated with the State and municipal governments and historically has been left to these governments, this regulatory activity is not an indispensible attribute of State sovereignty. Congress certainly has the power under the Commerce Clause to enact federal laws governing the operations of electric utilities. Had Congress chosen to exercise this

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[68] *Testa* v. *Katt, supra* at 389-90.

[69] Motion to Affirm, filed by State of Mississippi, at 12.

power by partially pre-empting State regulation and directing that Section 210 be implemented by federal enforcement authorities, however, utilities operating under State regulation would have been faced with confusing, duplicative, and possibly conflicting, regulation of identical transactions.

Under such a scheme of dual regulation, retail rates charged for electricity sold to industrial customers would generally be subject to State regulation, but rates for identical sales to industrial customers qualifying as cogeneration facilities would be subject to federal regulation. Similarly, adequacy of electric service generally would be a matter for State regulatory authorities, but the adequacy of back-up or supplemental service provided to qualifying facilities would be governed by federal regulation. And a federal agency's determination of the specific amount that a utility must pay, under the federal avoided cost rule, for electricity it is compelled to purchase from a qualifying facility could well differ from the State agency's measurement of the utility's incremental costs.[70] Such differences could raise serious and difficult questions concerning the appropriate costs for use in determining the utility's retail rates.

The solution adopted by Congress in Section 210 resolves these potentially severe practical problems by vesting authority to implement the Federal Energy Regulatory Commission rules in State agencies with day-to-day regulatory supervision over the retail operations of electric utilities. This solution imposes no significant burden upon these agencies that would not be imposed by the mere existence of the rules prescribed under Section 210(a). Even had Section 210 contained

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[70] The Federal Energy Regulatory Commission rules require that purchases of electricity from qualifying facilities in many situations must be made at the purchasing utility's "avoided cost," defined as "the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility . . . such utility would generate itself or purchase from another source." 18 C.F.R. § 292.101; *see also, id.* at § 292.304.

no express direction that State regulatory authorities implement the rules prescribed by the Commission under Section 210(a), State commissions would be obliged to carry out their regulatory functions in a manner that would not conflict with the provisions of Section 210.[71] The record below contains no evidence that implementation of the rules prescribed under Section 210 by State regulatory authorities would impose any considerable burden upon the States.[72] The Federal Energy Regulatory Commission has allowed State regulatory authorities "great latitude in determining the manner of implementation."[73] Its rules provide that implementation may consist of "the issuance of regulations, an undertaking to resolve disputes between qualifying facilities and electric utilities . . . or any other action reasonably designed to implement [the rules]."[74] The rules prescribed under Section 210 thus can be implemented by State authorities with no significant interference with their normal regulatory activities.

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[71] The rules prescribed under Section 210 thus have much in common with the surface mining regulations upheld by the Court last term in *Hodel* v. *Virginia Surface Mining and Reclamation Association, supra.* In fact, the State of Mississippi in the court below urged that the "choice allowed the State of Virginia in *Virginia Surface Mining* is startlingly similar to the choice given the state by PURPA." Mississippi's Reply Memorandum to the Defendant Secretary of Energy's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, at 30. As the Court held in that case, however, "nothing in *National League of Cities* suggests that the Tenth Amendment shields the States from pre-emptive federal regulation of *private* activities affecting interstate commerce. . . . The only limitation on congressional authority in this regard is the requirement that the means selected be reasonably related to the goal of regulating interstate commerce." 49 U.S.L.W. at 4660-61.

[72] The State of Mississippi presented evidence as to the financial costs that it contended would be imposed by the provisions in Titles I and III of the Act. No evidence concerning any burden specifically imposed by Section 210 was presented. See Ex B and C attached to Howle affidavit, filed in support of Mississippi's Motion's for Summary Judgment.

[73] 45 Fed. Reg. 12230 (1980).

[74] 18 C.F.R. § 292.401 (1980).

In sum, State implementation is practically essential if the undeniably important national objectives of Section 210 of the Public Utilities Regulatory Policies Act are to be achieved. This implementation imposes no significant burden upon State regulatory authorities. Nothing in Section 210 impairs the ability of the States to function effectively in a federal system, and nothing in the section abrogates functions that are essential to the separate and independent existence of the States contemplated in the Constitution. Accordingly, Section 210 should be upheld as a valid and constitutional enactment of Congress.

CONCLUSION

For the reasons stated, the decision of the court below should be reversed and this cause should be remanded with instructions to enter judgment dismissing the complaint insofar as it challenges the constitutionality of Section 210 of the Public Utility Regulatory Policies Act.

Respectfully submitted,

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